Supreme Court, U.S.
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No. 01-720

In The

Supreme Court of the United States

JACK C. CHILINGIRIAN,

Petitioner,

v.

BERNIE D. ELLIS,

Respondent.

On Petition For A Writ Of Ceritorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JACK C. CHILINGIRIAN
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42pp

QUESTION PRESENTED

Whether a Federal Prisoner who asserts his conviction is being executed in violation of the Constitution can resort to habeas corpus relief under 28 U.S.C. § 2241 prior to a determination of his direct appeal and prior to the filing of a § 2255 Motion.

PARTIES TO THE PROCEEDING

JACK C. CHILINGIRIAN is presently an incarcerated inmate at the Federal Correctional Institution located at Camp McKean in Bradford, Pa.

BERNIE D. ELLIS was the Warden of the Federal Correctional Institution located at Bradford, Pa.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, JACK C. CHILINGIRIAN, an incarcerated inmate, on behalf of himself respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., **infra**, 1a-3a) is unreported. The memorandum order of the district court (App., **infra** 4a-5a), adopting the report and recommendation of the Magistrate as the opinion of the court (App., **infra**, 6a-13a) is unreported.

JURISDICTION

The Judgment of the court of appeals was entered on June 22, 2201. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension Clause of the Constitution, Article 1 Sec. 9 Cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion to the Public Safety may require it."

2. The Fifth Amendment to the Constitution which reads in relevant part: "No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment, or indictment of a Grand Jury . . . "

3. The provisions of 28 U.S.C. § 2241 and 28 U.S.C. § 2243 are reprinted in the Appendix **infra** 14a-15a.

STATEMENT

After a Bench Trial in the United States District Court for the Eastern District of Michigan, the Petitioner was convicted on one Count of Conspiracy to Launder Money Instruments in violation of 18 U.S.C. § 1956(a)(1)(A)(i); 18 U.S.C. § 1956(a)(1)(B)(i); and 18 U.S.C. § 1956(h). Petitioner was sentenced to 37 months in custody with 2 years supervised release and restitution.

1. On November 10, 1998, a Grand Jury indicted the Petitioner, a practicing attorney, along with three others of 32 separate counts of criminal conduct in violation of 18 U.S.C. § 371 (Conspiracy); 18 U.S.C. § 1341 (Mail Fraud); 18 U.S.C. § 1343 (Wire Fraud); 18 U.S.C. § 2314 (Interstate Transportation of Funds Taken by Fraud); 18 U.S.C. § 2 (Aiding & Abetting); 18 U.S.C. § 1512(b)(1) (Tampering with a Witness); and with Conspiracy to Launder Money Instruments as described above.

2. The District Judge entered a General Finding pursuant to Rule 23 (App. **infra** 16a-17a), finding Petitioner **not guilty** on the first 31 counts in the indictment, but finding Petitioner guilty of Conspiracy to Launder Money Instruments in Count 33 of the Indictment.

3. The Petitioner timely moved for a Judgment of Acquittal under Rule 29(a). The District Judge denied the Motion and the Petitioner timely filed his Notice of Appeal in the Sixth Circuit Court of Appeals on October 27, 1999. Oral argument took place on June 13, 2001. The Direct Appeal remains pending, and no decision on the merits of the Direct Appeal has been issued by the Sixth Circuit Court of Appeals.

4. Petitioner filed Motions for Bail Pending Appeal in the District Court, the 6th Circuit Court of Appeals and in this Court, all of which were denied. Petitioner self-surrendered to the BOP on January 17, 2000, and has been in custody since that date.

5. On August 1, 2000, the Petitioner filed a Motion for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2243 in the United States District Court for the Western District of Pennsylvania, alleging that the Judgment of Conviction was being executed in violation of the Constitution, and seeking his immediate release from custody. Petitioner averred that the District Judge who had sentenced him, had amended the Indictment in violation of the Fifth Amendment of the Constitution. Petitioner relied upon the doctrine first enunciated in *Ex Parte Bain*, 121 U.S. 1 (1887) and later confirmed in *Stirone v. United States*, 361 U.S. 212 (1960).

6. Over the Petitioner's objections, the request for habeas relief was referred to a Magistrate Judge. After numerous Motions and continued objections that the order of reference constituted a Suspension of the Writ, the Magistrate issued a Report and Recommendation to dismiss the Petition on February 9, 2001. The District

Judge affirmed the Recommendation to dismiss in an Order entered on February 28, 2001.

7. The Petitioner timely filed a Notice of Appeal with the Third Circuit Court of Appeals on March 12, 2001. On June 22, 2001, without formal briefing and pursuant to Third Circuit IOP 10.6, the Third Circuit in an Opinion and Judgment which was unpublished, affirmed the dismissal of the Petitioner's request for habeas relief.

8. The Third Circuit Court of Appeals affirmance of the District Court's order dismissing the Petition for Habeas relief under § 2241 was premised on the Ninth Circuit decision in *United States v. Pirro*, 104 F.3d 297 (9th Cir. 1997), which held that any delay in considering a 28 U.S.C. § 2255 Motion caused by a pending direct appeal did not make § 2255 relief inadequate or ineffective sufficient to permit the Petitioner to utilize the "savings" clause of § 2255 and thereby allow for the filing of a Petition pursuant to § 2241. The Third Circuit opinion in the instant case prevents a Petitioner from obtaining immediate release from the execution of a Judgment of Conviction entered in violation of the Constitution.

REASONS FOR GRANTING THE PETITION

The Third Circuit Court of Appeals has declared that a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 is not available when an incarcerated defendant is in custody in violation of the Constitution or the laws of the United States and his direct appeal remains pending. This decision is based upon the premise that a § 2255 Motion is an available and adequate remedy even

if it is delayed until a direct appeal is decided. The instant decision and the Third Circuit's reliance upon *United States v. Pirro*, supra., conflicts with decisions of this Court relating to habeas relief. This Court's review is warranted.

1. The decision of the court of appeals misapprehends the nature and scope of the **GREAT WRIT**, and its role in the Federal Courts in protecting the liberty of those incarcerated in violation of the Constitution. The purpose of the **GREAT WRIT** has been historically regarded as an extraordinary remedy and "a bullwark against convictions that 'violate fundamental fairness.' " *Engle v. Isaac*, 456 U.S. 107, 126 (1982), quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977). As has been suggested: "those few who are ultimately successful in obtaining habeas relief are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay v. Noia*, 372 U.S. 391, 440-41 (1963). See also *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986). The Writ of Habeas Corpus "is designed to guard against extreme malfunctions in the criminal justice system." *United States v. Frady*, 456 U.S. 152, 165 (1982).

This Court has held that "the very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). This Court has consistently "rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Murray v. Carrier*,

477 U.S. 478, 501 (1986) (Stevens, J. Conc.) citing *Hensley v. Municipal Court*, 411 U.S. 345, 349-50 (1973).

The unique purpose of the **GREAT WRIT** is to release the applicant from unlawful confinement and for the applicant to obtain his freedom. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Further, as this Court has said of the federal writ: "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

The decision in the District Court which was affirmed by the Third Circuit holding that the § 2255 Motion is an "adequate and effective" remedy, conflicts with the underlying goal and function of both § 2255 and the authority of the **GREAT WRIT** itself. The rationale behind this concept is easy to discern. The principle that collateral review is different from a direct appeal resounds throughout out country's habeas jurisprudence. *Wright v. West*, 505 U.S. 277 (1992). This Court has on many occasions indicated that habeas relief cannot be denied solely on the ground that it should be accomplished through a direct appeal if constitutional violations are alleged *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963). It has been construed from the premise that habeas is not "a static, narrow, formalistic remedy." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) but one which must retain the "ability to cut through barriers of form and procedural morass." *Harris v. Nelson*, supra., at p. 291. Habeas proceedings must not be allowed to founder in a "procedural morass." *Price v. Johnston*, 334 U.S. 266, 269 (1948).

2. This case arises in the context of several well established rules, and precedents from this Court.

Prior to the enactment of 28 U.S.C. § 2255, a federal prisoner had the right to file a Petition for Habeas Corpus to attack the legality of his custody. In order to raise the constitutional or jurisdictional issues for relief, he needed only to show that he had no other "adequate" remedy other than the **WRIT.** In 1949 Congress amended § 2255 in part as follows:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, **unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."** (EMPHASIS ADDED).

Shortly after the above noted amendment was enacted, when specifically addressing the question of whether § 2255 intended to narrow the rights of defendants to obtain habeas relief, or delay, or reduce its procedural effectiveness, this Court in *Hayman v. United States,* 342 U.S. 205 (1952) in reviewing the history of § 2255 concluded:

> "This review of the history of § 2255 shows that it was passed at the insistence of the Judicial Conference to meet the practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of § 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, **the sole purpose was to minimize the difficulties encountered in habeas corpus hearings**

> by affording the same rights in another and more convenient forum." (EMPHASIS ADDED). 342 U.S. at p. 219.

Nowhere in the *Hayman* decision, nor in any other case from this Court, or any other is there an expression that resort to the **GREAT WRIT** is precluded prior to the resolution of a Direct Appeal or collateral review under § 2255.

The Third Circuit's reliance upon the *Pirro* case is misplaced. The *Pirro* court held for the first time anywhere in the jurisprudence of the United States that "a district court's delay in considering a § 2255 Motion until all direct appeals are resolved does not make the § 2255 Motion inadequate or ineffective and therefore does not entitle the defendant ***prematurely*** to pursue a § 2241 habeas petition."[1] 104 F.3d at p. 299. The only reason given for this categorical conclusion reached by the panel in *Pirro* was that:

> "Delay in considering a § 2255 Motion results from our direction that, for reasons of judicial economy, a district court should not entertain a habeas petition while there is an appeal pending in this Court or the Supreme Court." 104 F.3d at p. 299.

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[1] The word prematurely is italicized by the Petitioner to highlight the fact that the Panel in *Pirro* began its analysis with a firm but unexplained conviction that ***any*** habeas filing before an appeal is heard is "premature" despite the fact that no Federal Statute says this, no case from this Court suggests this, and no Constitutional principle supports this view. Moreover, this Court in *Peyton v. Rowe*, 391 U.S. 54 (1968) discarded this "prematurity doctrine" in the context of habeas relief.

Completely separate considerations are involved in the question presented by the Petitioner which was overlooked in *Pirro* and by the District Court in the instant case. Petitioner believes that the same reasons that support the rule that a § 2255 Motion cannot be filed during the pendency of a direct appeal, should form the basis for the support of a rule that when circumstances exist that Constitutional violations have occurred, and the defendant is illegally incarcerated, he should not be precluded from filing a concurrent § 2241 Petition. The *Pirro* panel's conclusion that a post-appeal § 2255 Motion is "an adequate and effective" remedy was a thinly veiled elevation of judicial economy over the plain language of § 2255, and was in direct conflict with the underlying goal of the **GREAT WRIT** itself. The *Pirro* panel's opinion which was adopted by the Third Circuit in the instant case, stands the purpose of being able to resort to § 2241 relief on its head. By concluding that where a § 2255 Motion, which is not expeditious (because it must wait until the appeal is resolved) is an "adequate and effective" remedy, a defendant is prevented from reaching the substantive merits of his constitutional claims by resorting to relief under § 2241. **BUT SUCH LOGIC IS ERRONEOUS BECAUSE § 2255 RELIEF IS NOT ADEQUATE AND EFFECTIVE IN THAT CIRCUMSTANCE.** If the defendant is illegally in custody because of an alleged constitutional violation, he will be required to remain in illegal custody for the duration of the time it takes for the appeal process to be completed. In the instant case, the Petitioner was sentenced in October of 1999. The direct appeal has still not been decided. There is no sound legal rationale for the District Court where Petitioner is incarcerated to refuse to

allow resort to the **GREAT WRIT** for relief from the execution of an unconstitutional judgment of conviction.

If left to stand, the opinion in the instant case means a person illegally in federal custody, who challenges the legality of his imprisonment by requesting habeas corpus relief **prior** to his direct appeal being decided, may have to wait upwards of two years before federal law provides any procedures or forum for determining if he is, indeed, illegally in custody.

For any court to suggest that such a procedure is an "adequate" or "effective" means for allowing a prisoner to challenge his incarceration is difficult for this Petitioner to understand. For a Court to say that it is adequate because allowing an earlier hearing would frustrate the goal of judicial economy, completely ignores and defeats the virtue of the **GREAT WRIT.**

If King George had said to the colonists that their habeas petitions could be heard in a year or two, after other procedures were exhausted, because it was more efficient or economic than affording a swift and fair hearing, one can only imagine the outcry. Yet this is what the opinions in *Pirro* and in the instant case have made the law in the Ninth Circuit and in the Third Circuit.

The rationale expressed in these decisions is contrary to the purpose of the **GREAT WRIT** and to the authority of this Court pertaining to seeking application for such relief.

3. The essence of modern habeas corpus is to safeguard the individual against ***unlawful*** custody. Habeas gets at the illegal custody or detention of an individual.

Its function is to test the power of the Government when it deprives an individual of liberty in the most basic sense.

In the seminal case of *Fay v. Noia,* 372 U.S. 391 (1963), Justice Brennan stated that the role of habeas was to "serve as an effective and imperative remedy for detentions contrary to fundamental law." 372 U.S. at 438.

This Court in *Fay v. Noia,* also pointed out that:

> "The Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; **if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.**" 372 U.S. at 401-02. (Emphasis added).

In *Fay v. Noia,* this Court also held that habeas was clearly available even though the imprisonment was imposed pursuant to a conviction of a Federal Court of competent jurisdiction. This Court stated:

> "The course of the decisions of this Court from Lange and Siebold to the present makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to a federal court of competent jurisdiction." 372 U.S. at p. 409.

Finally, Justice Brennan pointed to the history of habeas corpus and he stated clearly and unambiguously that if the restraint was contrary to fundamental law, it could be redressed by resort to the **GREAT WRIT**. The issue of whether constitutional claims fell within its scope was categorically accepted because "personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive that . . . the question of the Court's authority to try and imprison the party may be reviewed on habeas corpus." 372 U.S. at p. 409, citing *Ex Parte Siebold*, 100 U.S. 371, 376 (1880).

Even the dissent in *Fay v. Noia*, begrudgingly acknowledged the applicability of habeas under facts similar to the instant case. The dissent cited to the case of *Sunal v. Large*, 332 U.S. 174 (1947) which had suggested that the **GREAT WRIT** remained unavailable to consider questions that were or could have been raised in the original proceeding, or on direct appeal. However, it was agreed that the **GREAT WRIT** could be employed to permit consideration of constitutional questions, citing *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Johnston*, 312 U.S. 275 (1941); and *Waley v. Johnston*, 316 U.S. 101 (1942).

Although, this Court in *Sunal* had held that a federal prisoner could not assert **nonconstitutional** claims on collateral attack if he had not raised them on appeal, this Court in *Sunal* still recognized that this rule would not bar the assertion of constitutional claims in collateral proceedings even if the applicant had **failed to pursue** them on appeal. *Sunal*, 332 U.S. at p. 178-79.

This distinction was clearly affirmed by this Court in *Kaufman v. United States*, 394 U.S. 217 (1969). Acknowledging the vitality of *Sunal* this Court stated that federal habeas relief for constitutional claims asserted by federal prisoners was not limited by *Sunal*. In *Kaufman*, the Court cited *Townsend v. Sain*, supra., where the vital distinction between the appellate and habeas functions were examined and it was concluded that habeas relief could not be denied solely on the ground that relief should be sought by an appeal where constitutional violations were alleged. The Court in *Townsend* had declared:

> The whole history of the writ – its unique development – refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. **The function of habeas is different.** It is to test by way of original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest of allegations. . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear the power of inquiry on Federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which if proved, would entitle him to relief, the federal court to which the application is made has the power to receive the evidence and try the facts anew." 372 U.S. at 311-12. (Emphasis added).

The contention in the instant case is that there is an execution of an unconstitutional judgment of conviction. That the habeas Petition filed in the District Court in the instant case alleged that there was a constitutional violation on the face of the pleadings submitted and that relief should be accorded based on unrebutted claims that the

District Judge who had tried the case had amended the indictment in violation of the Fifth Amendment. This fact was clearly ignored by the Third Circuit panel below.

While it is true that a petition for habeas relief as a general principle is not allowed to do service for an appeal, there are several exceptions. *Sunal v. Large,* 332 U.S. at p. 178. Those exceptions are: (1) when the conviction was obtained under an allegedly unconstitutional statute; (2) when the conviction was imposed by a federal court whose jurisdiction over the person or offense was improper; and (3) when the trial or sentence violated constitutional protections. *Sunal,* 332 U.S. at p. 179-80.

Petitioner asserts that the instant case falls within the third category from *Sunal.* Collateral attack upon a Judgment of Conviction is permissible where constitutional violations have occurred. *Davis v. United States,* 417 U.S. 333, 345-46 fn. 15 (1974), citing *Kaufman v. United States,* supra at p. 223. See also, *Firestone v. United States,* 20 F. Supp. 2d 229, 232-33 (D. Mass 1998) which stands for the proposition that the concepts recited in *Sunal* would allow for collateral attack upon a judgment of conviction similar to the one entered in the instant case.

4. The Decision of the Third Circuit warrants review by this court. Aside from the inherent importance of any decision that involves the application of the **GREAT WRIT,** the decision in *Pirro* and the decision in the instant case conflicts with this Court's prior precedents as described above.

This Court has recognized that incarceration is an "infamous punishment" which deprives an individual of the freedom "to be with family and friends and to form

the other enduring attainments of normal life." *Fleming v. Nestor*, 362 U.S. 603, 617 (1960); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977).

The Petitioner avers that the decision by the Third Circuit contradicts prior precedent which expressed the concern that the failure to reach the merits of a petitioner's habeas claim "placed [the petitioner] into an enclosed loop from which he cannot escape." See *Hull v. Freeman*, 991 F.2d 86, 94 fn. 6 (3rd Cir. 1993). This is exactly what has happened in the instant case.

In describing this situation, one jurist has accurately and poignantly stated:

> "This case, in no small measure, reflects the current status of federal *habeas corpus* jurisprudence. Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles. . . . This large and increasingly complex web has now virtually obscured the core purpose of the Writ. Not only has this procedural web taken on a life of its own, it has developed its own unique nomenclature, a procedural cant further obscuring the merits of most *habeas corpus* actions. Rather than addressing the underlying merits of the constitutional claims asserted by a petitioner for *habeas corpus* relief, opinions in *habeas corpus* actions are now riddled (in both the primary and secondary sense of the word) with terms like 'procedural default,' 'cause and prejudice,' 'abuse of the writ,' 'successive petitions,' 'mixed petitions,' 'adequate and independent state law grounds,' 'the look through presumption,' 'the total exhaustion rule,' 'state waiver of the exhaustion

> defense,' 'non-retroactivity' 'non-cognizable constitutional claims,' 'fairly presented claims,' 'unintended claims,' 'objective factors external to the defense,' and 'the presumption of correctness.' The vast majority of federal *habeas* petitioners find themselves entangled in this omnipresent and perplexing procedural web, which effectively precludes federal courts from ever reaching the merits of their constitutional claims." *Lee v. Kemna*, 213 F.3d 1037, 1048 (8th Cir. 2000) (Bennet, J., Dissenting Opinion), cert. granted ___ U.S. ___, 149 L.Ed.2d 103 (2001).

Unless this Court grants review in the instant case, the decisions by the Courts below will constitute a suspension of the writ, and the authority of the **GREAT WRIT** will have been eviscerated, and it will not have been maintained unimpaired. *Bowen v. Johnston*, supra.

There is no legal authority, statute, Court Rule or case precedent from this Court which suggests that a habeas applicant must await disposition of a direct appeal or a habeas motion under 28 U.S.C. § 2255 prior to the filing of a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 to obtain immediate release from the execution of an unconstitutional Judgment of Conviction.

CONCLUSION

Based upon the above noted authority, and the arguments presented, the Petition for Writ of Certiorari should be granted.

DATED November 26, 2001

Respectfully submitted,

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APPENDIX A

HPS-135 **UNREPORTED – NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1606

JACK C. CHILINGIRIAN,

Appellant

v.

BERNIE D. ELLIS, Warden

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 00-cv-0227)
District Judge: Honorable Sean J. McLaughlin

Submitted For Possible Summary Action Under
Third Circuit LAR 27.4 and I.O.P. 10.6
June 18, 2001

Before: BECKER, *CHIEF JUDGE*, WEIS
AND GARTH, *CIRCUIT JUDGES*

(Filed: June 22, 2001)

OPINION

PER CURIAM

In April 1999 Jack Chilingirian was convicted after a bench trial in the United States District Court for the

Eastern District of Michigan of conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956. He was sentenced to 37 months imprisonment. His direct appeal is pending in the United States Court of Appeals for the Sixth Circuit. On August 1, 2000, Chilingirian filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, claiming that the trial judge amended the indictment in violation of the Fifth Amendment and his acquittal of other charges mandated an acquittal on the money laundering charge. The case was referred to a Magistrate Judge, who recommended that Chilingirian's habeas petition be dismissed because a motion pursuant to 28 U.S.C. § 2255 is the appropriate means for bringing his claims. The District Court adopted the report and recommendation of the Magistrate Judge, dismissed Chilingirian's § 2241 petition and dismissed all pending motions as moot.

As explained by the Magistrate Judge, Chilingirian's § 2241 petition may not be entertained because a motion under § 2255 is the appropriate means for bringing his claims, which attack the validity of his conviction. A collateral attack upon a federal conviction ordinarily must be raised in the sentencing court by motion pursuant to § 2255. Relief is not available under § 2241 "if it appears that the applicant has failed to apply for relief, by [§ 2255] motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255. Chilingirian's claim that a § 2255 motion is unavailable because of his pending direct appeal in the Sixth Circuit is unavailing. Delay in considering a § 2255

motion caused by a pending direct appeal does not make § 2255 relief inadequate or ineffective. *See United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). Moreover, contrary to Chilingirian's argument, *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997), does not support his claim that his "actual innocence" renders a § 2255 motion inadequate or ineffective. There is no indication that Chilingirian will not be able to file a § 2255 motion in the sentencing court should he receive an unfavorable ruling in his direct appeal.

For the reasons articulated herein and in the Magistrate Judge's Report and Recommendation as adopted by the District Court, we will summarily affirm the District Court's order entered on February 28, 2001. *See* Third Circuit I.O.P. 10.6. Chilingirian's motion for enlargement, release or bail pending review by this Court is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK C. CHILINGIRIAN,	)	
Petitioner	)	Civil Action No. 00-227E
vs.	)	Judge Sean J. McLaughlin/
BERNIE D. ELLIS, WARDEN,	)	Magistrate Judge Sensenich
Respondent	)	

MEMORANDUM ORDER

Petitioner's petition for writ of habeas corpus was received by the Clerk of Court on August 1, 2000 and was referred to United States Magistrate Judge Ila Jeanne Sensenich for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed February 9, 2001, recommended that Petitioner's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241, be dismissed. It further recommended that all pending motions be dismissed as moot. The parties were allowed ten (10) days from the date of service to file objections. Service was made on petitioner at FCI McKean and on counsel for respondent. Petitioner filed objections to the Report and Recommendation on February 22, 2001. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and petitioner's objections to report and recommendation, the following order is entered:

AND NOW, this 28th day of February, 2001;

IT IS HEREBY ORDERED that Petitioner's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241, is dismissed;

IT IS FURTHER ORDERED that all pending motions are dismissed as moot.

The report and recommendation of Magistrate Judge Sensenich, dated February 9, 2001, is adopted as the opinion of the court.

/s/ Sean J. McLaughlin
Sean J. McLaughlin
United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK C. CHILINGIRIAN Petitioner, v. BERNIE D. ELLIS, WARDEN, Respondent.	) Civil Action No. 00-227E) Judge Sean J.) McLaughlin/) Magistrate Judge) Sensenich

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that Petitioner's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241, be dismissed. It is further recommended that all pending motions be dismissed as moot.

II. REPORT

Petitioner, a federal prisoner at the Federal Correctional Institution at McKean, Bradford, Pennsylvania (F.C.I. McKean), proceeding *pro se*, brings this habeas corpus action pursuant to 28 U.S.C. §§ 2241 and 2243, challenging his sentence of thirty-seven (37) months incarceration, imposed by the United States District Court for the Eastern District of Michigan on October 19, 1999, on the basis that it was "executed" illegally in violation of the Fifth Amendment of the United States Constitution. (Pet. ¶¶ 1&3; 6.) Petitioner had been convicted on April 29, 1999, following a bench trial, of one

count of conspiracy to launder monetary instruments. (Pet. ¶ 10 and Ex. A.) For the following reasons, his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 should be dismissed to permit him to file, with the sentencing court, a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. All pending motions should be dismissed as moot.

Habeas Corpus Pursuant to 28 U.S.C. § 2241.

> The writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or. . . .

28 U.S.C. § 2241(c). "[H]abeas corpus under § 2241 is now reserved for rare cases." In *re Dorsainvil*, 119 F.3d 245, 250 (3d Cir. 1997). In *In re Dorsainvil* the United States Court of Appeals for the Third Circuit permitted a federal prisoner to resort to section 2241 where he was *completely barred from seeking any collateral review of his conviction* because of the new "gatekeeping" provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 142 Cong. Rec. H3305-01 (AEDPA), *and to deny him a remedy would constitute a complete miscarriage of justice*. 119 F.2d at 251-52 (emphasis added). In addition, "a challenge to a sentence as executed by the prison and

parole authorities may be made by petition for a writ of habeas corpus, whereas a challenge to the sentence as imposed must be made under 28 U.S.C. 2255." *Gomori v. Arnold*, 533 F.2d 871, 875 (3d Cir.), *cert. denied*, 429 U.S. 851 (1976). For example, a petition under 28 U.S.C. § 2241 is the appropriate means to challenge a conviction that has expired but the prison has not released the prisoner from custody. *United States v. Scott*, 803 F.2d 1095, 1096 (10th Cir. 1986).

Although Petitioner insists that he is attacking the "execution" of his sentence – in his words, "the execution of the judgment of conviction"[1] – actually he is attacking the validity of his conviction and the legality of the resulting sentence. Specifically, he claims that at the time of the court's General Findings on April 29, 1999, the district court judge amended the indictment in which he was charged, resulting in a broadening of the charges that were contained in the indictment. (Pet. ¶¶ 6-7) Furthermore, he claims that he should have been acquitted of conspiracy to launder monetary instruments because he was acquitted in counts 2 through 29 of mail fraud and wire fraud, the predicate acts upon which his conviction was based and that the court's subsequent finding of guilt as to this charge was legally defective, warranting his immediate release. (Pet. ¶ 12) Such claims directly challenge alleged errors that occurred at or prior to his sentencing rather than the execution of his sentence.

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[1] A judgment of conviction is a writing, signed by the judge and entered by the clerk, that sets forth "the plea, the verdict or findings, and the adjudication and sentence." Fed.R.Crim.Proc. 32(d)(1).

Thus, with respect to these claims, Petitioner may not obtain relief through section 2241.

Rather, a motion under 28 U.S.C. § 2255 is the proper procedure for a federal prisoner to raise a collateral attack on his federal sentence *for any error that occurred at or prior to sentencing. See In Re Dorsainvil*, 119 F.2d 245 (3d Cir. 1997); *Cox v. Warden, Fed. Det Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990). Title 28 of the United States Code, section 2255, in relevant part, provides that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> . . .
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*

(Emphasis added.)

Petitioner denies that section 2255 is the appropriate means for bringing his claims. Rather he asserts that his

claims challenging the execution of his judgment of conviction are properly brought pursuant to section 2241. As discussed above, however, Petitioner is actually challenging the validity of his conviction and the legality of the resulting sentence. Therefore, a motion filed pursuant to section 2255 in the United States District Court for the Eastern District of Michigan, Southern Division, is the appropriate means to challenge her claims. He asserts, however, that relief under 28 U.S.C. § 2255 is not available because of the pendency of his direct appeal in the United States Court of Appeals for the Sixth Circuit.[2] (Pet. ¶ 42) This argument is unavailing because delay in considering a section 2255 motion caused by a pending appeal is not sufficient to make the section 2255 remedy inadequate or ineffective. *U.S. v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). In *Pirro*, the United States Court of Appeals for the Ninth Circuit stated:

> Pirro would have us declare that a district court complying with our direction [that for reasons of judicial economy a district court should not entertain a habeas corpus petition while there is an appeal pending in the court of appeals or the Supreme Court] robs the section 2255 motion of its effectiveness. Such a result would allow all incarcerated defendants simultaneously to pursue both section 2241 petitions challenging the validity of their convictions and sentences and direct appeals challenging the same. This result would eviscerate our goal of judicial economy by engaging the attention of two courts on the

---

[2] Petitioner has a direct appeal as well as a renewed motion for bail pending before the United States Court of Appeals for the Sixth Circuit.

> same case at the same time. Accordingly, we hold that a district court's delay in considering a section 2255 motion until direct appeals are resolved does not make the section 2255 motion inadequate or ineffective and therefore does not entitle the defendant prematurely to pursue a section 2241 habeas petition.

104 F.3d at 299. Thus, even if he is precluded from pursuing a remedy under section 2255 in the United States District Court for the Eastern District of Michigan until after his direct appeal has been decided, that remedy is not inadequate or ineffective such that it constitutes a "rare exception" that would permit him to seek redress by way of a petition for writ of habeas corpus pursuant to section 2241.

III. CONCLUSION

Petitioner's claims challenge the legality rather than the execution of his sentence. Thus, the appropriate means to raise his claims would be by means of a section 2255 motion filed in the United States District Court for the Eastern District of Michigan, Southern Division, the district where he was adjudged guilty and was sentenced. Because he has a remedy available under 28 U.S.C. § 2255 he is foreclosed from raising the instant claims in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Therefore, it is recommended that the petition for writ of habeas corpus be dismissed. Because the petition should be dismissed, it is further recommended that all pending motions be dismissed as moot.

In accordance with the Magistrate Act, 28 U.S.C. § 6356(b)(1)(B) and (C), and rule 72.1.4(B) of the Local

Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ Ila Jeanne Sensenich
Ila Jeanne Sensenich
U.S. Magistrate Judge

Dated: February 9, 2001

cc: The Honorable Sean J. McLaughlin
United States District Judge

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APPENDIX D

28 USC § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their representative jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or committed in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity

and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

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28 USC § 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may under oath, deny any of the fact set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-3 JACK C. CHILINGIRIAN,

Defendant.

_____/

Criminal No. 96-CR-80670

Hon. John Corbett O'Meara

GENERAL FINDING PURSUANT TO RULE 23 WITH REGARD TO THE ALLEGATIONS INVOLVING THE DEFENDANT JACK G. CHILINGIRIAN IN THE THIRD SUPERCEDING INDICTMENT

(Filed Apr. 29, 1999)

Trial of this matter concluded April 19, 1999 and there being no request for special findings of facts, the court makes the following general finding pursuant to Rule 23 of the Federal Rules of Criminal Procedure:

COUNT ONE
(18 U.S.C. § 371 – CONSPIRACY)

The court finds the defendant Jack Chilingirian **NOT GUILTY**.

COUNTS TWO THROUGH FOURTEEN
(18 U.S.C. §§ 1343, 2 – WIRE FRAUD,
AIDING & ABETTING)

The court finds the defendant Jack Chilingirian **NOT GUILTY** of each and every count.

COUNTS FIFTEEN THROUGH TWENTY-NINE
(18 U.S.C. §§ 1341, 2 – MAIL FRAUD,
AIDING & ABETTING)

The court finds the defendant Jack Chilingirian **NOT GUILTY** of each and every count.

COUNT THIRTY
(18 U.S.C. § 2314, 2 – INTERSTATE
TRANSPORTATION FUNDS TAKEN BY FRAUD,
AIDING & ABETTING)

The court finds the defendant Jack Chilingirian **NOT GUILTY.**

COUNT THIRTY-ONE
(18 U.S.C. § 1512(b)(1) –
TAMPERING WITH A WITNESS)

The court finds the defendant Jack Chilingirian **NOT GUILTY.**

COUNT THIRTY-THREE
(18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i),
and 1956(h) – CONSPIRACY TO
LAUNDER MONETARY INSTRUMENTS)

The court finds the defendant Jack Chilingirian **GUILTY.**

The court orders the recording and filing of this general finding.

Sentencing will occur before this court at 10:00 a.m. on August 16, 1999.

So Ordered.

/s/ John Corbett O'Meara
John Corbett O'Meara
United States District Judge

Date: 4/29/99